

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

**FINAL STATEMENT OF REASONS AND
UPDATED INFORMATIVE DIGEST**

Subject Matter of Regulations: Workers' Compensation – Return to Work

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 10001 through 10005, 10133.53 and 10133.55**

The Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 59, 133, 4603.5, and 5307.3, has adopted Article 5 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 10001:

Section 10001	Definitions.
Section 10002	Offer of Work; Adjustment of Permanent Disability Payments.
Section 10003	Form [DWC-AD 10003 Notice of Offer of Work].
Section 10004	Return to Work Program.
Section 10005	Form [DWC-AD 10005 Request for Reimbursement of Accommodation Expenses].
Amend Section 10133.53	Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04."
Amend Section 10133.55	Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director."

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code §11346.9(d), the Acting Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. The purposes and rationales for the regulations as set forth in the Initial Statement of Reasons continue to apply.

The regulation changes from the initially proposed regulations are summarized below.

THE FOLLOWING SUBDIVISIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A 15-DAY COMMENT PERIOD:

Modifications to Section 10001

Definitions; subdivisions (a) “Alternative work” and (f) “Seasonal Work”

In subdivision (a), the definition of “Alternative work” was changed to reflect that alternative work may be offered by either the employer who employed the injured worker at the time of injury, or by another employer, where the previous employment was seasonal work. The typographical error “or” was changed to “of.” Some of the language proposed in the first 15 day comment period was deleted as the language was already contained in the definition of “Seasonal work” in subdivision (f).

The text states:

(a) “Alternative work” means work (1) offered either by the employer who employed the injured worker at the time of injury, or by another employer where the previous employment was seasonal work, (2) that the employee has the ability to perform, (3) that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and (4) that is located within a reasonable commuting distance of the employee's residence at the time of injury.

Section 10002 (g) addresses the situation where the injured employee is a seasonal worker and uses the term “seasonal work.” The language is based on the holding of *Henry v. WCAB* (1998) 68 Cal.App.4th 981. Therefore, section (f) was added to 10001 to define “Seasonal work.” Some of the language proposed in the first 15 day comment period was changed to delete text that was already contained in other definitions.

The text states:

(f) “Seasonal Work” means employment as a daily hire, a project hire, or an annual season hire.

Modifications to Section 10002

Offer of Work; Adjustment of Permanent Disability Payments

Subdivision (c) was amended to clarify that in order to be entitled to withhold 15% when there is a dispute regarding the permanent and stationary date, the claims administrator must have relied upon a permanent and stationary date contained in a medical report prepared by the employee’s treating physician, QME, or AME. The proposed modification replaced the words “In the event there is...” with: “If the claims administrator relies upon a permanent and stationary date contained in a medical report prepared by the employee’s treating physician, QME, or AME, but there is subsequently...”

Subdivision (f) was first added to address the situation where an employee has made an offer of regular, modified or alternative work to an injured employee and subsequently learns that the employee is an undocumented worker. The language is based on the holding of *Del Taco v. WCAB* (2000) 79 Cal.App.4th 1437. During a subsequent 15 day comment period, subdivision (f) was modified again in order to clarify that when an employer has made an offer of regular, modified or alternative work and subsequently learns that the employee cannot lawfully perform the work, without limitation to specific instances, the employer is not required to provide the work. Additionally, the case of *Anzelde v. WCAB* was added to the reference section. In *Anzelde*, the police officer applicant was unable to work at the modified job offered and created pursuant to the rehabilitation plan because of his participation in unlawful activities which were unrelated to his industrial injury.

The text states:

(f) When the employer offers regular, modified or alternative work to the employee that meets the conditions of this section and subsequently learns that the employee cannot lawfully perform regular, modified or alternative work, the employer is not required to provide the regular, modified or alternative work.

Reference: Sections 139.48, and 4658, Labor Code, *Del Taco v. WCAB* (2000) 79 Cal.App.4th 1437, *Anzelde v. WCAB* (1996) 61 Cal. Comp. Cases 1458 (Writ denied), and *Henry v. WCAB* (1998) 68 Cal.App.4th 981.

Subdivision (g) was added during the first 15 day comment period to address the situation where the injured employee is seasonal worker, a daily hire, or a project hire. The language is based on the holding of *Henry v. WCAB* (1998) 68 Cal.App.4th 981. The references were modified to cite the legal authorities: *Del Taco v. WCAB* (2000) 79 Cal.App.4th 1437 and *Henry v. WCAB* (1998) 68 Cal.App.4th 981.

The reference to “similar wages” (which was in the second 15 day comment version) was deleted in order to be consistent with the fact that Section 10001 (a) states that an offer of alternative work for a seasonal employee shall be at least 85% of the wages paid to the employee at the time of injury.

The text states:

(g) If the employer offers regular, modified, or alternative seasonal work to the employee, the offer shall meet the following requirements:

(1) the employee was hired for seasonal work prior to injury;

(2) the offer of regular, modified or alternative seasonal work is of reasonably similar hours and working conditions to the employee's previous employment, and where the previous employment was for seasonal work, the one year requirement may be satisfied by cumulative periods of seasonal work;

(3) the work must commence within 12 months of the date of the offer; and

(4) The offer meets the conditions set forth in this section.

Modifications to Section 10003

Form DWC AD 10003 Notice of Offer of Work.

At page 1 of DWC-AD Form 10003, the language was changed in order to be consistent with Labor Code section 4658 by adding the words “usual occupation or.”

The text states:

THIS SECTION TO BE COMPLETED BY EMPLOYER OR
CLAIMS ADMINISTRATOR:

Claims Administrator: _____	Claim Number: _____
(Name of Claims Administrator)	

Based on the opinion of _____ treating physician _____ QME _____ AME _____, you are able to return to the _____
(Name of Physician)
usual occupation or position you held at the time of your injury on _____ (Date).

At page 1 of Form 10003, the language was changed to clarify that the position is expected to last for a total of at least 12 months of work. Additionally, language was changed in order to account for the situation where between the injury and the time Form 10003 is completed and sent, there has been a change in the employee’s pay, such as cost of living increase or merit increase by adding the words “no less than” as opposed to “*equivalent to* the wages and compensation paid to you at the time of your injury.”

Also, a confirmation that the claims administrator verified with the employer the facts concerning the job offer was added. (In one version, the confirmation required verification. This was deleted, and the form now only requires the claims administrator to obtain the job information from the employer.)

The text states:

This position is expected to last for a total of at least 12 months of work. If this position does not last for a total of at least 12 months of work, you may be entitled to an increase in your permanent disability benefit payments.

This position provides wages and compensation of \$ _____, that are no less than the wages and compensation paid to you at the time of your injury.

I, _____ (Name of Claims Administrator), have obtained the above the job offer information from your employer.

At page 2 of Form 10003, a clarifying sentence explaining what the parties can do in the event of a dispute regarding the offer of regular work was added.

The text states:

If either party has a dispute regarding the offer of regular work, that party may file a Declaration of Readiness with the local district office of the Workers' Compensation Appeals Board (WCAB).

Finally, on page 3 of Form 10003, the Proof of Service, the prompting of the first two numbers of the year [20____] was omitted, so that the person filling out the form can write in the year.

The text states:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at _____ on _____.

Modifications to Section 10133.53

Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04"

Section 10002 (b) (3) of the proposed Return to Work regulations refers to Form DWC-AD 10133.53 (Section 10133.53) from the Supplemental Job Displacement Benefit regulations. Form DWC-AD 10133.53 has been modified (1) to correct the zip code on page 1 of the Form from 94102-3660 to 94142-0603; (2) to add a Proof of Service at

page 3 of the form; and (3) to update the date of the form from (08/05) to (08/06) at the bottom of pages 1-3 of the Form.

The text states:

(1):

(A.D., "SJDB," Division of Workers' Compensation, P.O. Box 420603, S. F., CA ~~94102-3660~~ 94142-0603)

(2):

Proof of Service By Mail

I am a citizen of the United States and a resident of the County of _____ . I am over the age of eighteen years and not a party to the within matter.

My business address is:

On _____ , I served the **Notice of Offer of Modified or Alternative Work** on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, and thereafter deposited in the U. S. Mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed _____ at _____ on _____ .

Signature: _____

Copies Served On:

(3):

MANDATORY FORM (Page 1 of 2 3)
STATE OF CALIFORNIA
(08/05) (08/06)

MANDATORY FORM (Page 2 of 2 3)
STATE OF CALIFORNIA
(08/05) (08/06)

MANDATORY FORM (Page 3 of 2 3)
STATE OF CALIFORNIA
(08/05) (08/06)

Modifications to Section 10133.55

Form DWC-AD 10133.55 “Request for Dispute Resolution before the Administrative Director”

Section 10003, Form DWC-AD 10003 Notice of Offer of Work, of the proposed Return To Work regulations refers to dispute resolution. The dispute resolution form is found at DWC-AD 10133.55 (Section 10133.53) in the Supplemental Job Displacement Benefit regulations. Form DWC-AD 10133.55 had been modified (1) to correct the zip code from 94102-3660 to 94142-0603 and (2) to correct the date of the Form from (08/05) to (08/06).

The proposed text states:

Summary of Parties' Informal Efforts to Resolve this Dispute		Proof of Service: I declare under penalty of perjury under the laws of the State of California that on the date written below, I mailed a copy of this request with a copy of any documents included with this request to the following parties at the following addresses:	
		Administrative Director, (SJDB), Division of Workers' Compensation, P.O. Box 420603, San Francisco, CA 94102-3660 <u>94142-0603</u>	
Name of Requester	Date	Signature	Date

(Mandatory Form DWC-AD 10133.55 ~~08/05~~ 08/06)

UPDATE OF MATERIAL RELIED UPON

Except for the case, *Anzelde v. WCAB* (1996) 61 Cal. Comp. Cases 1458 (Writ denied), which was added to the reference section in the amendments following the second 15-day comment period, no additional documents beyond those identified in the Initial Statement of Reasons were relied upon by the Administrative Director except that public comments received were taken into consideration when finalizing the regulations.

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

CONSIDERATION OF ALTERNATIVES

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Acting Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective as and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the charts contained in the rulemaking binder.

The public comment periods were as follows:

Initial 45-day comment period: October 14, 2005 through December 15, 2005

First 15-day comment period: February 7, 2006 through February 22, 2006.

Second 15-day comment period: April 4, 2006 through April 19, 2006.

Third 15-day comment period: May 5, 2006 through May 22, 2006.